Chong Chee Yan v Germila Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO KG 65 OF 1993/II
ZAKARIA SAM JC
20 NOVEMBER 2000

Civil Procedure *— Trial — Order of speeches — Application by plainitff for directions that the defendant begin the trial by opening their case — Whether court can give direction under O 35 r 4(1) of the Rules of the High Court 1980 — Whether burden of proving all issues lies on the defendants — Rules of the High Court 1980 O 35 r 4(1)*

The plaintiff claimed against the defendants for a sum of RM2m being the balance of monies due and owing pursuant to a letter of undertaking given by the defendants. The plaintiff sought for the directions of the court under O 35 r 4(1) of the Rules of the High Court 1980 ('RHC') that the defendants begin by opening their case as the burden of proof of the issues lies on the defendants. It was submitted that the defendants should begin by opening their case by virtue of O 35 r 4(6) of the RHC.

Held, dismissing the application:

(1) The court may give its direction under O 35 r 4(1) of the RHC on whether an action comes within the provisions of O 35 r 4(6) of the RHC or otherwise. If the facts of the case clearly attract the application of O 35 r 4(6) of the RHC, then the court shall give the necessary directions on the application of either party to the case under O 35 r 4(1) of the RHC (see p 265G–H).

(2) Generally, the party on whom the burden of proof of pleadings lies should begin. The question as to whom the burden of proof of an issue lies must depend on the construction of the pleadings. Having perused through the pleadings of both the plaintiff and defendants, it could not be said that all the issues in this case are to be established by the defendants (see pp 266H–I, 267G).

[**Bahasa Malaysia summary**

Plaintif telah menuntut daripada defendan-defendan wang sejumlah RM2j yang merupakan baki wang yang terhutang dan perlu dibayar menurut sepucuk surat akujanji yang diberikan oleh defendan-defendan. Plaintif memohon arahan mahkamah di bawah A 35 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bahawa defendan harus memulakan kes mereka sebab beban pembuktian tentang isu-isu tersebut terletak atas defendan-defendan. Adalah dihujahkan bahawa defendan-defendan hendaklah bermula dengan memulakan kes mereka menurut A 35 k 4(6) KMT.

Diputuskan, menolak permohonan tersebut:

(1) Mahkamah bolehlah memberikan arahannya di bawah A 35 k 4(1) KMT sama ada satu tindakan adalah terletak di bawah

A 35 k 4(6) KMT atau sebaliknya. Jika fakta-fakta kes dengan jelas memerlukan permohonan A 35 k 4(6) KMT, maka mahkamah hendaklah memberikan arahan-arahan yang perlu di atas permohonan mana-mana pihak dalam kes di bahawa A 35 k 4(1) KMT (lihat ms 265G–H).

(2) Secara umum, pihak di mana beban pembuktian membuat pliding terletak sepatutnya memulakan kes. Persoalan ke atas siapa beban pembuktian suatu isu tersebut terletak mestilah bergantung kepada pembentukan pliding tersebut. Setelah meneliti pliding-pliding kedua-dua plaintif dan defendan-defendan, tidaklah boleh dikatakan bahawa kesemua isu dalam kes ini patut dibuktikan oleh defendan-defendan (lihat ms 266H–I, 267G).]

Notes

For cases on trial, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4896–4968.

Cases referred to

Estate of Parry (deceased), Parry, Re the v Fraser & Anor [1997] 1 All ER 309 (refd)

Grunther Industrial Developments Ltd v Federated Employers Insurance Association Ltd [1973] 1 Llyod's Report 394 (refd)

Legislation referred to

Rules of the High Court 1980 O 35 r 4(1), (6)

RR Sethu (*James Lo* with him) (*George Lo & Partners*) for the plaintiff.
Lee Chuan Eng (*Ee & Lim*) for the defendants.

Zakaria Sam JC. :

The plaintiff through a letter dated 17 July 2000 (encl 142) sought for the directions of this court under O 35 r 4(1) of the Rules of the High Court 1980 ('RHC') that the defendants begin by opening their case as the burden of proof of the issues lies on the defendants.

Essentially the claim of the plaintiff against the first defendant is for the sum RM2m being the balance of monies due and owing pursuant to a letter of undertaking given by the first defendant to the plaintiff dated 6 July 1988.

Pursuant to another letter of undertaking dated 12 July 1988, the second defendant guaranteed the due performance and fulfilment of the terms and conditions of the earlier letter of undertaking.

It is also the allegation of the plaintiff that out of the amount of RM3m due and owing pursuant to the letter of undertaking dated 6 July 1988, a sum of RM1m had been paid as part-payment to the plaintiff.

In the course of his submission, the learned counsel for the plaintiff referred this court to O 35 r 4(6) of the RHC which provides:

> (6) W*here the burden of proof of all the issues in the action lies on the defendant* or, where there are two or more defendants and they appear separately or are separately represented, on one of the defendants, *the defendant* or that defendant, as the case may be, *shall be entitled to begin*, and in that case paras (2), (3) and (4) shall have effect in relation to, and as between, him and the plaintiff as if for references to the plaintiff and the defendant there were substituted references to the defendant and the plaintiff respectively. (Emphasis added.)

The learned counsel for the plaintiff reiterated that the defendants should begin by opening their case by virtue of O 35 r 4(6) of the RHC.

On the other hand, the learned counsel for the defendants in opposing the plaintiff's application explained that O 35 r 4(6) of the RHC would only be applicable in this action if the defendants on their own accord intended to begin by opening their case. In furtherance thereto, it was also submitted that the burden of proof on all the issues in this action is not on the defendants.

There is hardly any authority as to the applicability of O 35 r 4(6) of the RHC. However, the court may in a given situation exercise its discretion to give special direction under O 35 r 4(1) of the RHC as explained in the case of *Re the Estate of Parry (deceased), Parry v Fraser & Anor* [1997] 1 All ER 309 where it was held that:

> I think that the discretion of the judge under O 35 to give a special direction should not be fettered by attempting to lay down classes of case in which it will be proper to depart from the perfectly plain situation which prevails under O 35 r 7(2) and (6).
>
> (Order 35 r 7(2) and (6) of the RSC are equivalent to our O 35 r 4(2) and (6) of the Rules of the High Court).

In this context, the learned editor of 1 *Mallal's Supreme Court Practice*, (2nd Ed) at p 427 explains the effect of O 35 r 4(1) of the RHC as follows:

> This rule confers on the trial judge the power to give directions: (i) as to the party to begin; and (ii) as to the order of speeches at the trial. Generally, the party should begin on whom the burden of proof on the pleadings lies: *Seldon v Davidson* [1968] 1 WLR 1083; [1968] 2 All ER 755 (CA).

said two passages, one can surmise that the court may give its directions under O 35 r 4(1) of the RHC whether an action comes within the provisions of O 35 r 4(6) of the RHC or otherwise. If the facts of the case clearly attract the application of O 35 r 4(6) of the RHC, then the court shall give the necessary directions on the application of either party to the case under O 35 r 4(1) of the RHC.

As adverted to earlier, generally, the party on whom the burden of proof of pleadings lies should begin. This rationale is also in consonant with the provisions of O 35 r 4(6) of the RHC. Hence, by virtue of logical postulation, the question as to whom the burden of proof of an issue lies must depend on the construction of the pleadings. At this juncture, it is

useful to refer to the case of *Grunther Industrial Developments Ltd v Federated Employers Insurance Association Ltd* [1973] 1 Llyod's Report 394 where Roskil LJ after having agreed to the decision of Cairns LJ held that:

> … the substantial issue in this case is o the question of fraud raised by the defendant. That in the event may well prove to be so; but that, in my judgment, does not in the least determine upon whom is the obligation to open the case. For that it is necessary to look at the pleadings, and when one looks at the pleadings one finds that the statement of claim alleges a loss under a consequential loss policy of fire insurance. The defence first of all requires the production of that policy as a condition precedent to its admission; and, secondly, puts in issue the loss. Therefore, it seems to me that before there can be any question of the issue of fraud arising here, the plaintiffs must first of all produce the original policy, because otherwise, without its production, the claim fails in limine; and, secondly, the plaintiffs must prove some loss even though it is agreed that liability only is to be determined at the trial; because without proof of some loss there could be no cause of action in any event.

In the present case, the defendants are not denying the existence of the two letters of undertaking dated 6 July 1988 and 12 July 1988 respectively, however, it is their contention that the said two letters are void for want of certainty in the terms as contained therein and also for want of consideration. Hence, it is for the plaintiff to prove the certainty and effect of the terms in the two letters and also the amount alleged to be owing by the defendants in the sum of RM3m. Furthermore, it is also imperative on the part of the plaintiff to show that the two letters are not void for want of consideration.

The defendants in their defence are also alleging that subsequent arrangements entered into between the plaintiff, defendants and various other parties vitiated the undertakings given by the defendants, the particulars of which are stated in paras 9(i) to (viii) of the defence. These allegations would certainly effect the enforceability of two letters of undertaking. In the circumstances, the burden of proof is then reposed on the plaintiff to establish that the two letters could be legally enforced against the defendants.

Finally, there is also this issue of RM1m which the plaintiff alleged to be part-payment forwarded by the defendants to the plaintiff.

In conclusion, having perused through the pleadings of both the plaintiff and defendants, it could not be said that all the issues in this case are to be established by the defendants.

Hence, upon the foregoing reasons, I ordered that the plaintiff is to begin by opening his case and the application of the plaintiff to be dismissed with costs to the defendants and to be taxed unless agreed.

Application dismissed.

Reported by Jafisah Jaafar